

USE OF LAWYER-CLIENT PRIVILEGED INFORMATION BY IN-HOUSE COUNSEL WHISTLEBLOWERS IN THEIR OWN RETALIATORY DISCHARGE ACTIONS UNDER THE ENVIRONMENTAL LAWS

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The U.S. Department of Labor has recently blown a big hole in the protection for whistleblowers under the federal environmental laws, and in so doing has reduced the protection of all of us from environmental hazards. In a recent decision by the Department of Labor Administrative Review Board (“ARB”),¹ the ARB held that lawyers employed by corporations, in-house counsel, may not use any documents or information covered by lawyer-client privilege in claims for illegal retaliation when they blow the whistle on their employers’ environmental law violations.² The ARB’s decision ignores the leading cases allowing the use of privileged information by in-house counsel in lawsuits brought to seek redress for their illegal firing or other discriminatory action,³ as well as a recent American Bar Association formal opinion on legal ethics addressing this problem.⁴

In *Willy*, a lawyer who was tasked by his employer to head a team to visit and review environmental compliance at one of the corporation’s plants, and who was an expert on environmental law and the Environmental Protection Agency’s regulations, wrote a report critical of the compliance status of the plant, pointing out numerous probable violations of

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1. The ARB speaks with the authority of the Secretary of Labor in administrative litigation under those laws enforced by the Department of Labor. *See* 61 Fed. Reg. 19,978-01 (May 3, 1996) (effective upon publication in the Federal Register) (establishing the Administrative Review Board and stating “[t]he Administrative Review Board is hereby delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions on questions of law and fact” pertaining to certain matters); *see also* *Varnadore v. Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998).

2. *Willy v. Coastal Corp.*, A.R.B. Case No. 98-060 (Feb. 27, 2004), *available at* <http://www.oalj.dol.gov/public/wblower/DECSN/85caa01q.htm>.

3. *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173 (3d Cir. 1996).

4. A.B.A. Comm. On Ethics and Prof’l Responsibility, Formal Op. 01-424 (2001).

law.⁵ The lawyer was severely chastised for writing the report in that manner and ultimately, he claims, fired for it.⁶ He filed a complaint with the Department of Labor in 1984 under the Clean Air Act, and at the hearing introduced a draft copy of the report, over the objection of the corporation, as part of his proof of the series of events that culminated in his discharge.⁷ The case made its way to the Secretary of Labor who held in 1994 (before the establishment of the ARB), that in-house counsel are entitled to the same protections as other employees under the whistleblower provisions of the environmental laws, and that they can utilize otherwise privileged information to vindicate their own rights under those laws, consistent with an attorney's ethical obligations to his client.

Eight years after the Secretary remanded the case to the Administrative Law Judge to calculate damages due the attorney, the ARB reconsidered the question whether it was proper to admit the attorney's report in evidence, thereby destroying the client's privilege.⁸ In February 2004, the ARB held the document should not have been admitted and, absent any other evidence of retaliatory intent, dismissed the complaint, 20 years after it had been filed.⁹

In *Kachmar v. Sungard Data Systems, Inc.*, the Third Circuit held that an in-house counsel claiming that she was discharged for opposing her employer's alleged discriminatory policies is protected by the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 and may, with appropriate protections devised by the trial court, utilize attorney-client privileged information to prove her claim.¹⁰ In concluding that a house counsel is protected by Title VII from retaliation for raising her own discrimination claims as well as objecting to the discriminatory treatment of others, the Third Circuit agreed with the statement of the Fifth Circuit over ten years earlier in *Doe v. A Corporation*, that "[a] lawyer . . . does not forfeit his rights simply because to prove them he must utilize confidential information. Nor does the client gain the right to cheat the lawyer by imparting confidences to him."¹¹ The court in *Kachmar* noted that every other federal court that had considered the question whether house counsel may pursue

5. *Willy*, ARB Case No. 98-060, at 2.

6. *Id.* at 3.

7. *Id.* at 10.

8. *Id.* at 18-19.

9. *Id.* at 36-37.

10. 109 F.3d 173 (3d Cir. 1996).

11. *Id.* at 182 (quoting *Doe v. A Corp.*, 749 F.2d 1043, 1050 (5th Cir. 1983)).

retaliation claims against their former employers concluded that they could.¹²

Although the court recognized the important policy embodied in the rule of attorney-client confidentiality, the Third Circuit in *Kachmar* held nevertheless that

In balancing the needed protection of sensitive information with the in-house counsel's right to maintain the suit, the district court may use a number of equitable measures at its disposal "designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege." Among [these protective measures are] "[t]he use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings."¹³

The Administrative Review Board misconstrued *Kachmar* in attempting to distinguish it. Focusing only on the Third Circuit's discussion of the sometimes subtle distinction between an in-house attorney's opposition to her employer's policies and her legal advice to the corporation, the ARB concluded that *Kachmar* stands only for the proposition that information obtained by an in-house attorney that "did not directly relate to her work as an attorney" may be admitted in the attorney's Title VII retaliation case.¹⁴ If that were the only holding of the case, the court's discussion of the need to balance the attorney's right to maintain the suit against the need to protect client confidences, which are "subject to the [attorney-client] privilege," would have been unnecessary.¹⁵

Moreover, the Administrative Review Board considered none of the means of protecting Coastal Corporation's confidences suggested by the court in *Kachmar* when it dismissed Willy's complaint. Indeed, a simple stipulation that Willy had written the critical memo, without revealing any of the specifics of his findings concerning the plant he had reviewed, would have been sufficient for him to establish the predicate for his claim of retaliation. None of the other evidence necessary for him to carry his burden of proof, that retaliation was a motivating factor in his dismissal, would have required revealing Coastal's confidences.

12. See *id.* at 179 (citing six discrimination cases that support the notion that "once an attorney's employment has terminated, (s)he is not barred from bringing suit against the former employer for retaliatory discharge under Title VII").

13. *Id.* at 182 (quoting *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 504 (Cal. 1994) (en banc)).

14. Willy v. Coastal Corp., A.R.B. Case No. 98-060 at 35 (Feb. 27, 2004).

15. *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 182 (3d Cir. 1996) (construing *Doe v. A. Corp.*, 709 F.2d 1043, 1050 (5th Cir. 1983)) (quoting *General Dynamics*, 876 P.2d at 504).

On September 22, 2001, the American Bar Association issued a formal opinion entitled “A Former In-House Lawyer May Pursue a Wrongful Discharge Claim Against Her Former Employer and Client as long as Client Information Properly is Protected.”¹⁶ The opinion pointed out that “[t]here is nothing in the Model Rules [of Professional Conduct] that precludes a lawyer from suing her former client and, in fact, the Rules contemplate that such actions may occur.”¹⁷ The Model Rules explicitly provide that a lawyer may reveal information relating to the representation of the client “to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client”¹⁸

The 2001 ABA opinion notes that this was a change from the prior Code of Professional Responsibility that limited revelation of client confidences to cases in which the lawyer was seeking to collect his fee or defend himself against charges of wrongdoing.¹⁹ A number of state rules of professional conduct have adopted the more recent approach taken by the ABA.²⁰

But the Administrative Review Board held that it was a breach of an attorney’s ethical obligations to his client to use privileged material in his own lawsuit against the client, his former employer.²¹ The ARB relied on Weinstein on Evidence and its outmoded distinction between use of client confidences defensively, for example, to defend against a charge by the client of wrongful conduct by the attorney, and use of privileged information in support of affirmative claims by an attorney against his former employer,²² and completely ignored the more recent ABA opinion and the central holding of *Kachmar*, discussed above.

16. A.B.A. Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-424 (2001).

17. *Id.*

18. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2001).

19. *See Formal Op. 01-424* (quoting MODEL CODE OF PROF. RESP. DR 4-101(C) (1978): “A lawyer can reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.”).

20. *See e.g.*, TEX. DISCIPLINARY RULES OF PROF. CONDUCT R. 1.05(c)(5) (2002) (“A lawyer may reveal confidential information. . . to the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.” (emphasis added)); N. J. DISCIPLINARY RULES OF PROF. CONDUCT RPC 1.6(c)(2) (2002); FLA. RULES OF PROF. CONDUCT R. 1.6 (2000); ARIZ. RULES OF PROF. CONDUCT ER 1.6(d) (2002) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.”).

21. *See Willy v. Coastal Corp.*, A.R.B. Case No. 98-060 at 35 (Feb. 27, 2004) (holding that “Willy must prove his environmental whistleblower retaliatory discharge complaint, if at all, without the use of material protected under the attorney-client privilege.”).

22. *See id.* at 33 (quoting WEINSTEIN’S FED. EVIDENCE § 503-1 (Matthew Bender 2d ed.): “[The self-defense exception] is a shield, not a sword.”).

Congress' primary purpose in enacting the environmental whistleblower laws was not simply to provide a remedy to courageous employees who speak out against environmental hazards caused by their employers.²³ Congress was determined to protect those employees as a means of protecting the environment and the public health and safety from pollutants and toxic materials in the nation's air and water.²⁴ Surely, in-house counsel who blow the whistle on threats to public health and safety are entitled to as much protection as those who oppose unlawful discriminatory practices. By failing to protect an attorney who reports these hazards, the Department of Labor undercut this Congressional objective and failed in its responsibility, through the protection of whistleblowers, to assist in the protection of us all from environmental hazards.

23. H.R. REP. NO. 95-294, at 34 (1977).

24. *Id.*